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No. 83-1716

In the Supreme Court of the United States

OCTOBER TERM, 1983

NEWPARK SHIPBUILDING & REPAIR, INC., ET AL., PETITIONERS

v.

JAMES P. ROUNTREE, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE FEDERAL RESPONDENT IN OPPOSITION

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This case involves a decision by the Benefits Review Board vacating a compensation award under the Longshoremen's and Harbor Workers' Compensation Act and remanding to the administrative law judge (ALJ) with instructions to enter additional factual findings and legal conclusions regarding the measure of compensation. The court of appeals, sitting en banc, dismissed the case for want of a final, appealable order under 33 U.S.C. 921(c). The judgment below is correct, is consistent with all relevant decisions of this Court and other courts of appeals, and raises no issue warranting this Court's review.

1. a. Respondent James Rountree, a welder, was injured during his first day of work for petitioner Newpark Shipbuilding & Repair, and has not worked since March 29, 1978. He filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act, 33

U.S.C. 901 *et seq.* After a hearing, the administrative law judge found that Rountree was entitled to a disability benefit based on an average weekly wage of $360.41. The only issue of relevance to this case is the method of calculation of Rountree's average weekly wage.

The Longshoremen's Act prescribes three alternative methods for calculating the average weekly wage of an injured employee at the time of the injury. See 33 U.S.C. 910. Which method should be applied in a particular case depends on the employee's work history.[1] The difficulty in this case arises from the fact that Rountree had been employed in his position with Newpark for less than one day at the time of his injury, and his previous employment had been irregular, much of it in the capacity of an independent contractor.

In the administrative proceeding, Newpark contended that the appropriate measure of compensation in this case was set by Section 10(b), 33 U.S.C. 910(b) — an average weekly wage based on the earnings of Newpark's other welders during the year preceding the injury. The ALJ concluded, however, that Section 10(b) could not fairly

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[1]Section 10(a) (33 U.S.C. 910(a)) is based on the worker's average actual daily wage, and is applicable to any worker who "shall have worked in the employment in which he was working at the time of the injury, whether for the same or another employer, during substantially the whole of the year immediately preceding his injury." Section 10(b) (33 U.S.C. 910(b)) is based on the average wage of an employee of the same class in the same or similar employment in the same or a neighboring place, and is applicable to workers who do not satisfy the criteria under Section 10(a). Section 10(c) (33 U.S.C. 910(c)) provides that the annual wage shall be "such sum as * * * shall reasonably represent the annual earning capacity of the injured employee," taking into account his own prior earnings, those of other employees of the same or most similar class, and other employment, including self-employment, of the worker. Section 10(c) is applicable where Sections 10(a) and 10(b) "cannot reasonably and fairly be applied." See 33 U.S.C. 910, *reprinted at* Pet. App. A120-A121.

be applied because employees in Rountree's job category had recently received a pay increase that would not be reflected in the Section 10(b) calculation, and because the statistical sample of Rountree's co-workers was too small (Pet. App. A102, A109-A110). Accordingly, the ALJ applied Section 10(c), 33 U.S.C. 910(c), a method that takes into account a variety of factors, including prior earnings during periods of self-employment. He then calculated an average weekly wage based on Rountree's gross earnings in self-employment during the year preceding the injury (Pet. App. A110).

On appeal to the Benefits Review Board, petitioner Newpark again contended that Section 10(b) should be employed in this case (Pet. App. A62). The Board rejected that argument, agreeing with the ALJ that Section 10(c) is applicable (Pet. App. A68). However, the Board rejected the ALJ's specific calculus under Section 10(c), finding that Rountree's gross earnings, which included elements of profit and good will, were not an accurate reflection of the reasonable value of his services as a welder. The Board therefore remanded to the ALJ "for additional findings of fact and conclusions of law" (Pet. App. A71). The Board stated (*id.* at A71-A72 (footnote omitted)):

> On remand, the administrative law judge must determine the reasonable value of [Rountree's] services when self-employed by considering the cost of hiring another welder of skill and experience comparable to [Rountree] or by using any other rational means. The administrative law judge may open the record to take additional evidence as is necessary.

b. Petitioner Newpark appealed the Board's order pursuant to 33 U.S.C. 921(c), which permits any person "adversely affected or aggrieved by a final order of the Board" to obtain review in the court of appeals for the

circuit in which the injury occurred. The federal respondent, the Director of the Office of Workers' Compensation Programs of the Department of Labor, moved to dismiss the appeal, contending that the Board's decision was not a "final order" appealable under 33 U.S.C. 921(c).

A divided panel of the court of appeals concluded that it had jurisdiction to hear the appeal (Pet. App. A30-A36) and reversed the Board's decision on the merits, holding that Section 10(b), rather than Section 10(c), is applicable to this case (Pet. App. A41-A44). On rehearing en banc, however, the full court concluded, four judges dissenting, that the Board's decision is not a "final order" and hence not appealable (*id.* at A1-A26).

2. a. The court of appeals correctly concluded that the Board's decision is not a final order within the meaning of 33 U.S.C. 921(c). That section, as the court below noted (Pet. App. A4) and petitioners do not dispute, "follows * * * the contours of the finality-requirement under 28 U.S.C. § 1291 for appealability of decisions of the district courts." The Board's decision, which simply vacated an ALJ's initial decision and remanded for additional factual findings and legal conclusions in accordance with the Board's suggested method or "any other rational means" (Pet. App. A72), plainly is not final in the sense of being a decision that "ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 467 (1978) (citations omitted). It is not, therefore, a final order in the usual sense.

Nor does the Board's order fall within any recognized exception to the final judgment rule. Petitioners rely on the so-called "rule of practical finality" of *Gillespie* v. *United States Steel Corp.*, 379 U.S. 148 (1964). However, as this Court has explicitly stated, the approach to finality exemplified in *Gillespie* should not be "extended beyond the

unique facts of that case"; otherwise, the final order rule "would be stripped of all significance." *Coopers & Lybrand*, 437 U.S. at 477 n.30. There are numerous differences between this case and *Gillespie*,[2] and it would not be possible to "apply" *Gillespie* here without doing violence to this Court's repeated, narrow interpretations of the final judgment rule. See, most recently, *Flanagan* v. *United States*, No. 82-374 (Feb. 21, 1984). This is not, in any event, a "marginal" case, falling within a " 'twilight zone' of finality." *Gillespie*, 379 U.S. at 152. The decision of the Board finally determines no issues,[3] dismisses no parties, and has no immediate consequences. It is not a final order.

Petitioners' reliance on *American Export Lines, Inc.* v. *Alvez*, 446 U.S. 274 (1980), is likewise misplaced. As in *Gillespie*, the appealability issue was not raised until after certiorari had been granted. During oral argument, the Court raised the appealability question sua sponte, and stated in the plurality opinion that "were the case in the posture in which it stood when the petition for certiorari was filed, we might well determine that the judgment lacked sufficient characteristics of finality to warrant an assertion of our appellate jurisdiction" (*id.* at 277). However, in the

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[2]For present purposes, it suffices to point out that in *Gillespie*, the appealability issue was not raised until after certiorari was granted and argument on the merits was presented. This was one of the key factors identified by this Court in *Coopers & Lybrand* as explaining the result in *Gillespie*. 437 U.S. at 477 n.30. Here, the appealability issue has been raised by the federal respondent from the outset of appellate proceedings.

[3]The decision does not, as petitioners assert (Pet. 8), leave nothing for the ALJ to determine other than "the dollar amount of Rountree's average weekly wage." Rather, it contemplates additional proceedings in which the ALJ will consider methods of determining "the reasonable value of [Rountree's] services when self-employed" (Pet. App. A71), including considering the cost of hiring other welders and "any other rational means" devised by the ALJ (*id.* at A71-A72).

period between the grant of certiorari and the decision on the merits, the trial court had issued a final judgment on the merits, and no federal question, other than that before the Court, remained to be decided (*id.* at 277-278). Obviously, *Alvez* does not support appellate review here, where the federal respondent raised the appealability issue at the beginning, there has been no final judgment by the ALJ, and all of the issues in the case are federal issues, potentially reviewable by the court of appeals and this Court.[4]

b. The decision below is consistent with every other court of appeals decision on the issue. The courts have uniformly held that a Board order deciding certain issues but remanding to the ALJ for further findings is not a final, appealable order. See, *e.g., Director, OWCP* v. *Brodka*, 643 F.2d 159, 161 (3d Cir. 1981); *National Steel & Shipbuilding Co.* v. *Director, OWCP*, 626 F.2d 106, 107-108 (9th Cir. 1980); *Newport News Shipbuilding & Dry Dock Co.* v. *Director, OWCP*, 590 F.2d 1267, 1268 (4th Cir. 1978); see also cases cited at Pet. App. A12-A13.

St. Louis Shipbuilding & Steel Co. v. *Casteel*, 583 F.2d 876 (8th Cir. 1978), is not to the contrary (see Pet. 23-25). In *Casteel*, a final judgment fixing the amount of compensation was issued by the ALJ after the petition for review had been filed, but before the case was submitted for decision on the merits. See unpublished order of ALJ on remand, No. 76 LHCA 314 (DOL Dec. 7, 1977) (OWCP No. 2172-101).[5]

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[4] *Alvez* is also inapposite because it involved the standards for review of state court judgments under 28 U.S.C. 1257, which, as the court of appeals recognized (Pet. App. A9), are "different and distinguishable" from those under 28 U.S.C. 1291 and 33 U.S.C. 921(c).

[5] A copy of that order has been lodged with the Clerk of the Court and provided to counsel for petitioners.

Although the opinion for the *Casteel* court does not specifically allude to the ALJ's intervening action, the court's conclusion that it had jurisdiction is supported by citations to two prior decisions in which courts determined that a Board order, though not final when the petition for review was filed, had become final by the time the case was heard on the merits because of intervening action by the ALJ. 583 F.2d at 876 n.1 (citing *Nacirema Operating Co.* v. *Lynn*, 577 F.2d 852, 853 n.1 (3d Cir. 1978); *Sea-Land Service, Inc.*, v. *Director, OWCP*, 540 F.2d 629, 631 n.1 (3d Cir. 1976)). The rationale of those cases is, of course, not applicable here.

c. Petitioners argue strenuously (Pet. 15-23) that to hear an appeal of the order in this case would increase judicial efficiency and avoid needless delay. Essentially, they argue that if the Board is reversed now, rather than later, the parties will be spared an unnecessary stage of litigation before the ALJ and the Board. The fallacy in their argument, however, is that it assumes the result. If we assume that an order is erroneous, then it will always follow that its immediate correction would speed the eventual conclusion of the case. But just as clearly, if we assume that the order is correct (as it will be in the large majority of cases), an interlocutory appeal would greatly protract the proceedings, both by interrupting the administrative process and by creating the potential in every case for two appeals (one at the interlocutory stage, and another after final judgment).[6]

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[6]The severe consequences to appellate dockets of adopting petitioners' position are described by the court of appeals at Pet. App. A15-A16 n.8. The court referred especially to the experience in Pennsylvania, where the courts experimented with, and then abandoned, such an approach to appeals of workers' compensation decisions. See *Murhon* v. *Workmen's Compensation Appeal Board*, 51 Pa. Commw. 214, 414 A.2d 161 (1980).

That is why classes of orders must be viewed on a categorical basis and why, on that basis, Congress insisted upon finality as a prerequisite to review of Board orders.

Strict adherence to the final judgment rule is particularly important in workers' compensation cases under the Longshoremen's Act, where the statutory policy requires "that the appellate process [not] result in delay of payment of compensation." S. Rep. 92-1125, 92d Cong., 2d Sess. 15 (1972). If an employer is permitted to take an appeal from a Board decision before there is an enforceable compensation award, then the worker will be denied his right to that compensation during the pendency of the appeal. Even where, as here, the employer or an insurer provides *some* compensation benefits while the litigation proceeds (Pet. 2), the worker may not receive the full benefit of the presumption that the Board's award is correct for purposes of payments during the appeal process.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

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